No. __-____ (1)

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OY PARTEK AB,

Petitioner,

—v.—

ANNABELLE BOONE, Personal Representative of the Estate of LAWRENCE BOONE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Under *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), may a state court exercise personal jurisdiction over an alien defendant that sells a commodity product outside the United States to an exclusive United States purchaser located outside of the forum State, when the defendant has no knowledge of or control over that purchaser's subsequent sales of the product in the forum State and does nothing to promote or further those sales?

PARTIES TO THE PROCEEDING

Respondents are Annabelle Boone, Personal Representative of the Estate of Lawrence Boone, Deceased; Ronald M. and Joanne Boyce; John D. and Shirley Cumens; John E. Gebhart and Janice M. Brown-Gebhart; Jerry Ginn; Mary A. and John P. Hirneisen; Morris and Nancy Hitchens; James Hudson; Paul and Linda Huff; Richard L. and Fern Hunter, Sr.; Richard Jenkins; Michael A. and Linda Joswick; Philip S. and Sylvia Mitchener; Doris Moyer; Delores and Anthony Pierce; Edith B. and Lloyd Rathbone; Robert and Kathleen Rosenberger; George and Margaret Wilfong, Sr.; and Addison P. and Mary H. Williams.

Petitioner Oy Partek Ab has no parent corporation. Its subsidiaries and associated companies, other than wholly-owned subsidiaries, are as follows:

Addtek International Oy Ab
Parma Metals Oy
RS Hansa-Auto Oy
Armstrong Parafon AB, Sweden
Controladora Accionaria Y Administrativa S.A. De C.V., Mexico
Rakke Lubjatehase AS, Estonia
Rockwool Ecoprim AB, Sweden
Steinullarverksmidjan H/F, Iceland
Cervuctum Oy
Polar-Yhtyma Oy
Specialty Minerals Nordic Oy Ab
Unsa Oy
Viljavuuspalvelu Oy
Lana Di Roccia S.P.A. Isolroc, Italy
Verdalskalk A/S, Norway
Kalmar Industries AB, Sweden
AB Kalmar Industries Finans, Sweden
AS Finmec, Estonia
Kalmar LMV AB, Sweden
Kalmar LMV Sverige AB, Sweden

Sisu Terminal Systems Oy, Finland
Velsa Oy, Finland
Partek Cargotec Co Ltd, South Korea
Logging Norge A/S, Norway
Sisu Logging Equipamentos Ltda, Brazil
Valtra do Brasil S.A., Brazil
Valtra Guarapuava Maq. Agricolas Ltda, Brazil
Suomen Karbonaatti Oy, Finland
Uddagårdskalk AB, Sweden
UAB Partek Paroc, Lithuania

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. __-____

OY PARTEK AB,

Petitioner,

—v.—

ANNABELLE BOONE, Personal Representative of the Estate of LAWRENCE BOONE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

Oy Partek Ab respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Delaware in this case.

OPINIONS BELOW

The order of the Supreme Court of the State of Delaware is reported at 1998 WL 138690 (Del. Supr. Feb. 12, 1998). It is reproduced at App. A. *infra*, 1a. The opinion and order of the Superior Court of the State of Delaware in and for New Castle County ("the Superior Court") is unreported. It is reproduced at App. B, *infra*, 2a.

JURISDICTION

The Supreme Court of the State of Delaware entered its judgment affirming the Superior Court's denial of Partek's Motion to Dismiss for Lack of Personal Jurisdiction on February 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987); *Calder v. Jones*, 465 U.S. 783, 788, n.8 (1984).

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case presents the Court with the opportunity to clarify that a foreign commodity producer's sale to an exclusive United States purchaser who is not its agent, without more, is equivalent simply to placing a product in the stream of commerce, and therefore is *not* "additional conduct" indicating "an intent or purpose to serve the market in the forum State" on which personal jurisdiction can be founded under Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 112 (1987).

Petitioner Oy Partek Ab ("Partek") is a Finnish corporation with its headquarters and operations in Pargas, Finland, which mined asbestos in Finland. (A-260)[1] During the 1960's and early 1970's, Partek sold some of the asbestos fiber it mined in Finland to an independent New York purchaser named

[1] Citations to "(A-)" refer to the Appendix in the Delaware Supreme Court.

Huxley Development Corporation and its predecessor Huxley-Westfried (collectively "Huxley"). As "an independent company over which Partek had no control," Huxley re-sold the asbestos fiber to its approximately ten customers in the United States, including Haveg Industries ("Haveg") and Amoco/Avisun ("Avisun") in Delaware. (App. B at 5a) Partek itself did not sell or distribute asbestos to Delaware. (App. B at 5a)

Huxley was the only buyer of Partek asbestos in the United States. (A-261) Sometime in the 1950's, Huxley approached Partek because it had heard that Partek was able to supply anthophyllite asbestos. (A-265) After negotiations in Finland, Huxley obtained by contract dated September 17, 1959, the exclusive right to sell Partek asbestos in the United States to whomever it chose on whatever terms as to price or otherwise Huxley might arrange. (A-172, 178, 189) Huxley made no contracts in Partek's name and had no right to do so. (A-168, 176-178) Partek never directed, supervised or observed Huxley's operations. (A-168) Partek had no control or knowledge of Huxley's advertising program, and did not itself advertise in Delaware. (A-179) Huxley did not identify its customers to Partek or Partek to its customers. (A-168)

The asbestos fiber purchased by Huxley, including asbestos destined for the Avisun and Haveg plants, was sold to Huxley by Partek FOB Finland and, pursuant to Huxley's instructions, was shipped to New York, Baltimore or Philadelphia. (App. B at 5a) There is no evidence that any asbestos fiber was shipped from Finland to Delaware.

Partek's sole contacts with Delaware consisted of two visits by Partek employees from Finland to Delaware over a quarter of a century ago. On the first occasion, Richard Waller, a sales manager, visited the Haveg and Avisun plants on September 23-24, 1971, in the course of a tour arranged by and in the company of Huxley. (A-183-184) This was Partek's first contact with Huxley's customers. A year later an engineer, Rolf Söderstrom, visited the Haveg plant to learn about

Haveg's work in the acid leaching of asbestos. (A-185) As the Delaware Superior Court noted, the purpose of these visits is disputed. (App. B at 18a-19a) However, there is no suggestion in the record that the claims of any plaintiff arise in any way out of these two brief contacts.

Respondents below asserted that Partek had additional contacts with Delaware. Respondents alleged, *inter alia*, that Partek created a special type of asbestos for the Avisun plant, that Partek attempted at Huxley's behest to provide better bags for the Avisun and Haveg plants that would produce less dust when opened, and that Partek conducted business with a Delaware company in the 1980's. Partek disputed these alleged contacts, as well as others that respondents alluded to below. However, the Superior Court, in reaching the decision at issue here, did not make any findings as to these allegations and relied instead solely on Partek's contract with Huxley.[2]

A. Proceedings Before The Superior Court Of The State Of Delaware

Respondents, thirty-three individuals, brought suit against Partek in the Superior Court of the State of Delaware in and for New Castle County for personal injuries allegedly caused by exposure at the Delaware plants of Haveg or Avisun to asbestos produced by Partek in Finland and sold to Haveg and Avisun by Huxley.

On April 16, 1996, Partek moved in the Superior Court to dismiss the complaints against it for, *inter alia*, lack of personal jurisdiction. Respondents took extensive discovery in the form of depositions and interrogatories. On September 4, 1997, after reviewing the materials submitted to it and hearing legal argument, the Superior Court denied Partek's motion to dismiss for lack of personal jurisdiction in a written opinion and order.

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[2] Although the Superior Court did discuss the two visits made to Delaware by Partek employees, it did not rely on these contacts in making its decision.

The Superior Court found that respondents had failed to put forward any evidence that Huxley acted in any capacity as Partek's agent. (App. B at 11a, n.3) However, applying the standard articulated by Justice O'Connor's plurality opinion in *Asahi*, the Superior Court found that "Partek, through its distribution agreement with Huxley, has engaged in the additional conduct necessary under the stream of commerce theory so as to establish minimum contacts with Delaware." (App. B at 17a, 20a)

In so holding, the Superior Court appeared to suggest that the distributorship agreement with Huxley was evidence of Partek's "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," within the meaning of *Asahi*, 480 U.S. at 112, even if Huxley was not Partek's agent at all. The Superior Court ruled that by contracting with Huxley to be the exclusive distributor of Partek's product in the United States, jurisdiction was established wherever Huxley sold that product, since it was "[i]mplicit" in such an agreement that Huxley would solicit business "from the Country as a whole, including Delaware." (App. B at 18a) The court thus dispensed with the need to further inquire into the nature or substance of Partek's relationship with Huxley; in effect, by labeling the sales contract with Huxley an "exclusive distributor" agreement, the Delaware court made the exclusivity of the contract a constitutional touchstone, foreclosing further analysis of the nature and quality of the defendant's forum-oriented conduct.[3]

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[3] Although not relying upon them in making its jurisdictional determination, the Superior Court also found that the two isolated visits by Partek employees to Delaware manifested Partek's "intent or purpose to serve the Delaware market" and that as a result of the visits "Partek's employees knew that its asbestos was being shipped into Delaware." (App. B at 18a, 19a)

B. The Proceedings Before The Supreme Court Of The State Of Delaware

Following the denial of its motion to dismiss, Partek sought and the Superior Court granted leave to take an interlocutory appeal of its order and opinion on October 2, 1997. On February 12, 1998, after briefing and oral argument, the Supreme Court of the State of Delaware affirmed the Superior Court's judgment in a one paragraph order that is attached as Appendix A. The Supreme Court's order refers only to the Delaware long arm statute, but necessarily implicit in its decision that "Delaware has properly exercised its jurisdiction . . . for the reasons assigned by the Superior Court. . ." (App. A at 2a) is its adoption of the Superior Court's judgment on the constitutional issue.[4]

REASONS FOR GRANTING THE WRIT

The Supreme Court Of The State Of Delaware Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Clarified By This Court And On Which State Courts Of Last Resort Are In Conflict.

In *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), Justice O'Connor's plurality opinion held that placing a product into the stream of commerce was not, in and of itself, an act of a defendant purposefully directed toward the forum State. "[S]omething more," was required to satisfy Due Process above and beyond the "mere. . . awareness" that a product may or will be swept

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[4] In Delaware, as in most states, an assertion of personal jurisdiction must satisfy both the state long-arm statute *and* constitutional Due Process. App. B at 8a; *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (Oct. 16, 1996). Partek of course does not seek certiorari with respect to the Delaware Supreme Court's state statutory ruling. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413, n.7 (1984).

into the forum State through the stream of commerce. *Id.* at 111. One example given by the plurality opinion of "additional conduct" that might justify the exercise of personal jurisdiction—and the only one of that opinion's examples that the Delaware court found relevant to Partek—is the defendant's "marketing [of] the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112.

This case presents the Court with the opportunity to clarify that sales of a product by an alien manufacturer to an exclusive United States purchaser who is not an agent of the manufacturer in either form or substance is not "additional conduct" sufficient to support the exercise of personal jurisdiction under this standard. In doing so, this Court can refine, for the first time since *Asahi* was decided twelve years ago, the criteria for evaluating when a foreign defendant's sale of a product to a United States buyer outside the forum who subsequently re-sells it in the forum becomes purposeful availment "of the privilege of conducting business" in the forum State, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), for purposes of asserting personal jurisdiction under the Due Process Clause.

The present case furnishes an appropriate vehicle for this exercise, because it tests the limits of the *Asahi* plurality's frequently encountered example of a "distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112. Having an exclusive customer that acts entirely independently of the foreign manufacturer, as Huxley did of Partek, is significantly different from marketing a product through a sales agent. A distributor "who has agreed to serve as the sales agent in the forum State," agrees to act at the manufacturer's behest and direction, reports to the manufacturer on its activities and customers, and typically works with the manufacturer to provide product support, warranty service, advertising, and advice to customers. The distributor thus functions as the manufacturer's eyes, ears and presence,

if not proxy, in the forum, and thereby fits comfortably within the concept of "purposeful availment" of the forum's benefits that has been the hallmark of due process analysis in this area since *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and that drove the Court's reasoning in *Burger King* and *Asahi*. An arm's length seller-buyer relationship when the buyer is not located in the forum does not carry with it anything like the same kind of purposive direction of the defendant's conduct toward the forum State, which indeed only enters the picture when the buyer eventually re-sells the product there. Whether that subsequent sale "proximately result[s] from actions by the defendant *himself* that create a 'substantial connection' with the forum State," *Burger King*, 471 U.S. at 475 (emphasis in original) (citation omitted), can legitimately be doubted.

It is for this reason that the plurality in *Asahi*, unwilling to predicate jurisdiction on simply "[t]he placement of a product into the stream of commerce" with awareness "that the stream . . . may, or will sweep the product into" the forum State, required "something more" for jurisdiction to be asserted. *Asahi*, 480 U.S. at 111-12. The "additional conduct" required, however, should be more than the mere existence of something that can be denominated a "distribution agreement," regardless of its terms. Where, as here, the distribution agreement is simply an exclusive right to sell, with no further involvement of any kind by the manufacturer with the distributor or the product, the substance of the relationship is simply the sale of products into the "stream of commerce." That there is an agreement governing the sale is part of the everyday transaction of business in the modern world. That the sale is to one rather than multiple purchasers, which was the sum and substance of Partek's relationship with Huxley, is not either linguistically or logically "additional conduct" by Partek purposefully directed toward the State of Delaware. The "something more" required by the *Asahi* plurality is missing. To hold otherwise would be to return to the "stream of commerce" theory that was rejected by the *Asahi* plurality, which, in effect, was what the Delaware courts did here.

In addition, the Delaware courts' decision runs afoul of the long-held tenet that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Burger King*, 471 U.S. at 474 (quoting *Hanson*, 357 U.S. at 253). Resale of a product by a customer such as Huxley is just such a unilateral act when the manufacturer has no control over where and how that product was to be resold, as was manifestly the case with Partek and Huxley.

Two other state courts of last resort, when faced with the question of whether the sale of a product by a foreign corporation to a United States entity over which it had no control constituted the requisite "additional conduct," have rendered decisions that conflict with the decision below. *Anderson v. Metropolitan Life Ins. Co.*, 694 A.2d 701 (R.I. 1997); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996). In those cases, the Supreme Courts of Texas and Rhode Island applied the law set forth in the *Asahi* plurality opinion and dismissed claims against an Australian miner of asbestos fiber, CSR, for lack of personal jurisdiction on facts substantially similar to the ones presented in this case. In *CSR Ltd.*, the Supreme Court of Texas determined that Texas lacked jurisdiction over CSR even when CSR sold some 363 tons of raw asbestos fiber to Johns-Manville, FOB Australia, and Johns-Manville shipped that asbestos directly to Texas. Fundamental to that decision was the fact that CSR did not control or participate in Johns-Manville's decision to ship asbestos to Texas and thus did not " 'create, control or employ' the distribution system that brought the asbestos into Texas." *CSR Ltd.*, 925 S.W.2d at 595 (quoting *Asahi*, 480 U.S. at 112.). The fact that CSR was aware that the asbestos might end up in Texas, because it knew that there was a Johns-Manville plant in Texas, was an insufficient basis for personal jurisdiction. *Id.* As the Texas court reasoned, CSR's knowledge that the asbestos might travel to Texas was not an indication that CSR intended to serve the Texas market. *Id.*

Similarly, in *Anderson*, the Supreme Court of Rhode Island found that CSR's shipments of asbestos fiber to the United States for sale to Johns-Manville, which incorporated the fibers into products which it subsequently shipped to Rhode Island, was not a sufficient basis on which to predicate jurisdiction. *Anderson*, 694 A.2d at 702-03. The *Anderson* court found that CSR's sale to Johns-Manville was the equivalent of placing the product into the stream of commerce, nothing more.

Comparison of the instant case with these decisions of sister state supreme courts demonstrates that different constitutional analyses are being used to determine whether alien product manufacturers whose products find their way to a particular state, through the unilateral activity of another, are subject to the jurisdiction of that forum. This conflict is a source of continuing uncertainty and jurisdictional litigation that can only be resolved by a decision of this Court. The need for a resolution by this Court is particularly desirable where, as in this case, non-United States parties are involved and international trading partners are subject to unpredictable assertions of jurisdiction based on uncertain standards.

The purpose of the Court's constitutional jurisprudence of personal jurisdiction, in the last analysis, is to give foreign defendants "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J. concurring in judgment), and thereby "give[ ] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *See Burger King*, 471 U.S. at 472. To accomplish this purpose, foreign defendants must be able to know what kinds of sales or distribution arrangements will, or will not, subject them to the massive costs and burdens of litigation in the United States. The instant case provides an opportunity to bring needed clarification to the law in this important and much-litigated area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 5, 1998

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF DELAWARE

No. 409, 1997

Submitted Feb. 10, 1998

Decided Feb. 12, 1998

Court Below—Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 96C-03-181; 95C-11-121; 96C-06-218; 95C-12-089; 96C-03-252; 96C-03-050; 96C-03-180; 96C-06-050; 96C-03-049; 96C-03-269; 96C-08-065; 96C-04-251; 96C-03-253; 96C-07-018; 96C-02-125; 96C-02-155; 96C-06-071; 96C-07-224; 96C-07-168; 96C-08-072; 96C-07-168; 96C-05-227; 96C-02-127; 96C-03-193; 96C-01-083; 96C-01-011; 95C-12-057; 96C-04-112; 96C-01-067; and 96C-05-268.

OY PARTEK AB,

Defendant Below, Appellant,

—v.—

Annabelle Boone, Personal Representative of the Estate of Lawrence Boone, Deceased; Ronald M. & Joanne Boyce; Gary L. and Debbie M. Cole; Thelma Clark, Individually and as Executrix of the Estate of Marshall Clark, Deceased; John D. and Shirley Cumens; Claude and

Rebecca Dupree; John E. Gebhart and Janice M. Brown-Gebhart; Jerry Ginn; George Harrigan; Bernice Hayman; Mary A. and John P. Hirneisen; Morris and Nancy Hitchens; James Hudson; Paul and Linda Huff; Richard L. and Fern Hunter; Jerome Jackson, Executor of the Estate of Mildred Jackson, Deceased; Walter and Emma Janowski; Richard Jenkins; Michael A. and Linda Joswick; Edwin P. and Cornelia K. Mampe; Phillip S. and Sylvia Mitchener; Doris Moyer; Ellis and Loretta Pierson; Delores and Anthony Pierce; Edith B. and Lloyd Rathbone; Robert and Kathleen Rosenberger; Anna F. Warrington, Individually and as Executrix of the Estate of Wayne W. Warrington; George and Margaret Wilfong, Sr.; and Addison P. and Mary H. Williams;

Plaintiffs Below, Appellees,

Before

HOLLAND, HARTNETT and BERGER,

Justices.

ORDER

This 12th day of February, 1998, the Court has concluded that Delaware has properly exercised its jurisdiction over the defendant-appellant, Oy Partek Ab, pursuant to 10 Del.C. § 3104(c)(4), for the reasons assigned by the Superior Court in its well-reasoned decision dated September 4, 1997.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANNABELLE BOONE	:	C.A. No. 96C-05-227
RONALD BOYCE	:	C.A. No. 96C-02-127
GARY L. COLE	:	C.A. No. 96C-03-181
THELMA CLARK	:	C.A. No. 95C-11-121
JOHN CUMENS	:	C.A. No. 96C-06-218
SCOTT B. DERR	:	C.A. No. 96C-07-226
CLAUDE DUPREE	:	C.A. No. 95C-12-089
JOHN GEBHART	:	C.A. No. 96C-03-193
JERRY GINN	:	C.A. No. 96C-03-252
GEORGE HARRIGAN	:	C.A. No. 96C-03-050
BERNICE HAYMAN	:	C.A. No. 96C-03-180
MARY A. HIRNEISEN	:	C.A. No. 96C-06-050
MORRIS HITCHENS	:	C.A. No. 96C-01-083
JAMES HUDSON	:	C.A. No. 96C-03-049
PAUL HUFF	:	C.A. No. 96C-03-269
RICHARD L. HUNTER, JR.	:	C.A. No. 96C-08-065
MILDRED JACKSON	:	C.A. No. 96C-04-251
WALTER JANOWSKI	:	C.A. No. 96C-03-253
RICHARD JENKINS	:	C.A. No. 96C-07-018
MICHAEL JOSWICK	:	C.A. No. 96C-02-125
EDWIN P. MAMPE	:	C.A. No. 96C-02-155
EARL MARSHALL	:	C.A. No. 94C-08-247
PHILIP MITCHENER	:	C.A. No. 96C-01-011
DORIS MOYER	:	C.A. No. 96C-06-171
ELLIS PEIRSON	:	C.A. No. 96C-12-057
DELORES PIERCE	:	C.A. No. 96C-07-224
EDITH B. RATHBONE	:	C.A. No. 96C-08-072
ROBERT ROSENBERGER	:	C.A. No. 96C-04-112
WAYNE R. WARRINGTON	:	C.A. No. 96C-07-168
EUGENE WEBER	:	C.A. No. 95C-03-269
GEORGE WILFONG	:	C.A. No. 96C-01-067
ADDISON WILLIAMS	:	C.A. No. 96C-05-268

Submitted: May 15, 1997

Decided: September 4, 1997

Upon Defendant Oy Partek Ab's Motion to Dismiss for Lack of Personal Jurisdiction—MOTION DENIED.

BABIARZ, Judge.

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This is the Court's opinion regarding Oy Partek Ab's motion to dismiss for lack of personal jurisdiction. Oy Partek Ab argues that Delaware's long arm statute, 10 *Del. C.* § 3104, and the Due Process Clause of the Constitution do not support the exercise of jurisdiction in this matter. In accordance with this opinion Oy Partek Ab's motion is DENIED.

I.

This lawsuit arises from the plaintiffs' alleged exposure to asbestos in Delaware. All of the plaintiffs worked at either Haveg Industries in Marshallton, Delaware or Amoco/Avisun in New Castle, Delaware. The asbestos used in these plants, known as anthophyllite asbestos, was produced by defendant Oy Partek Ab (hereinafter "Partek"), a Finnish corporation.

Partek acquired its asbestos mine in Paakkila, Finland in 1959 and mined the anthophyllite asbestos until 1975 when the mine was closed for economic reasons. Partek, itself, did not sell or distribute the asbestos to Delaware. Instead, Partek had a contract with Huxley Development Corporation, a New York firm (hereinafter"Huxley"), which gave Huxley the exclusive right to sell Partek's asbestos in the United States. Huxley was an independent company over which Partek had no control. Huxley would purchase asbestos from Partek, already bagged and labeled, F.O.B. Helsinki. Huxley would then ship the asbestos to ports in New York, Baltimore or Philadelphia. Huxley was the entity that found customers for Partek's asbestos and any inquiries made to Partek from United States buyers regarding its asbestos were turned over the Huxley. Huxley distributed asbestos to approximately ten customers in the United States including Haveg and Avisun.

As a result of contracting ilnesses related to asbestos, plaintiffs brought suit against several parties including Oy Partek Ab. Specifically, plaintiffs allege that Partek, the manufacturer of the asbestos, failed to properly label the asbestos by warning of its dangerous propensities. In addition, plaintiffs

charge the bags that the asbestos was shipped in were defective in that they easily broke causing excess exposure to the asbestos fibers. In response, Partek has raised the defense of lack of personal jurisdiction. According to Partek, personal jurisdiction over them is barred by both Delaware's long arm statute, 10 *Del. C.* § 3104,[1] and the Fourteenth Amendment of the United States Constitution.

II.

Before this Court may address the merits of Partek's motion, the Court must first determine whether Partek is collaterally estopped from asserting lack of personal jurisdiction in this case. In 1985, during an unrelated asbestos law suit involving different plaintiffs, Partek filed a similar motion to dismiss for lack of personal jurisdiction. *Merganthaler v. Asbestos Corp. of America*, Del. Super., C.A. No. 81C-OC-

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[1] The pertinent parts of 10 *Del. C.* § 3104 provide:

(b) The following acts constitute legal presence within the State. Any person who commits any of the acts hereinafter enumerated thereby submits to the jurisdiction of the Delaware courts. . . .

° As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

(1) Transacts any business or performs any character of work or service in the State;

(2) Contracts to supply services or things in this State;

(3) Causes tortious injury in the State by an act or omission in this State;

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State; . . . .

104, Poppiti, J. (Aug. 30, 1985). In that case, the court determined that personal jurisdiction over Partek was proper under 10 *Del. C.* § 3104(c)(4) and that the exercise of such jurisdiction did not offend the due process clause. Plaintiffs argue that since neither the facts or the law has changed since the *Merganthaler* decision, Partek is collaterally estopped from re-litigating the issue of personal jurisdiction.

When the use of collateral estoppel advances the claims of the plaintiff as opposed to the defendant it is known as offensive collateral estoppel. *Chrysler Corp. v. New Castle County*, Del. Super., 464 A.2d 75, 81 (1983). Offensive collateral estoppel is designed to protect parties from having to relitigate identical issues and thereby promote judicial economy. *Id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979)). However, there are several considerations that may militate against the use of this doctrine, including issue of fairness. *Chrysler Corp.*, 464 A.2d at 82. As a result, the use offensive collateral estoppel is left to the broad discretion of the trial court. *Id.* In instances where there have been changes in the controlling legal principles surrounding the controversy, the court should decline to exercise this discretion. *Id.* at 83 (citing *Montana v. U.S.*, 440 U.S. 147, 161, 99 S.Ct. 970, 977 (1979)).

The parties cite a plethora of factors that courts have considered when addressing collateral estoppel. However, it is unnecessary to delve into these because this Court determines that the use of offensive collateral estoppel is inappropriate in this instance. This is so because Partek's arguments arise from changes in the legal principles surrounding personal jurisdiction that occurred post *Merganthaler*. Thus, in the interest of fairness this Court finds it is necessary to address Partek's jurisdictional arguments.

III.

In a motion to dismiss for lack of *in personam* jurisdiction the plaintiffs bear the burden of showing the basis for juris-

diction. *Greenly v. Davis*, Del. Supr., 486 A.2d 669, 670 (1984); *Harmon v. Eudaily*, Del. Super., 407 A.2d 232, 233 (1979). This burden is satisfied if the plaintiffs make a prima facie showing that Delaware's long-arm statute confers jurisdiction. *Outokumpu Engineering Enterprises, Inc. v. Kvaerner Enviropower, Inc.*, Del. Super. C.A. No. 95C-12-080, Herlihy, J. (July 10, 1996). In assessing whether the exercise of jurisdiction is appropriate, the duty of the Court is two fold. First, it must determine whether jurisdiction is appropriate under Delaware's long-arm statute. And, second, it must evaluate whether asserting such jurisdiction would offend the Due Process Clause of the Constitution. *Carlton Investments v. TLC Beatrice International Holdings, Inc.*, Del. Ch., C.A. No. 13950, Allen, C. (Oct. 16, 1996); *Mumford v. Mumford*, Del. Super., C.A. No. 93C-06-032, Terry, J. (Feb. 6, 1995). In making this determination the Court must view all factual disputes in a light most favorable to plaintiff. *Outokumpu, supra.*

IV.

In line with modern *in personam* jurisdiction philosophies Delaware's long arm statute, 10 *Del. C.* § 3104, has been divided into two main categories: general and specific jurisdiction. Sections 3104(c)(1), (c)(2) and (c)(3) have been deemed to be specific jurisdiction provisions. *Outokumpu, supra*; *Colonial Mortgage Service Co. v. Aerenson*, 603 F. Supp. 323, 327 (D. Del. 1985); *Applied Biosystems, Inc. v. Cruachem, LTD.*, 772 F.Supp. 1458, 1466 (D. Del. 1991). Specific jurisdiction is at issue when the plaintiff's claims arise out of acts or omissions that take place in Delaware. *Applied Biosystems, Inc.*, 772 F.Supp. At 1467; *Colonial Mortgage Service Company*, 603 F. Supp. at 327 n.2. In this circumstance, jurisdiction is based on the relationship between the forum and the controversy. *Macklowe v. Planet Hollywood, Inc*, Del. Ch., C.A. No. 13689, Steele, V.C., at 7-8 (Oct. 13, 1994) (citation omitted).

Section 3104(c)(4), on the other hand, has been deemed a general jurisdiction provision. *Outokumpu*, 658 A.2d at 727-28; *Mayhall v. Nempco, Inc*, Del. Super., 91C-10-018, Steele, V.C. (July 29, 1994); *Chaplake, supra*. General jurisdiction is at issue when the plaintiff's claims are unconnected with the nonresidents activities. *Chaplake, supra.*; *Mayhall, supra*. In this instance jurisdiction is based on the relationship between the forum and one of the parties; the forum's connection with the controversy is immaterial. *Macklowe, supra*. (citation omitted).

Applying the specific and general jurisdiction dichotomy to the facts of this case leads Partek to conclude that Delaware's long-arm statute does not confer jurisdiction over it in this case. Partek argues that the *Merganthaler* decision, which found that jurisdiction was appropriate under § 3104(c)(4), is flawed. This is so, according to Partek, because § 3104(c)(4) is deemed to be a "general jurisdiction" statute. General jurisdiction, Partek continues, requires that the defendant's contacts with the state be "current" in order to properly exercise personal jurisdiction. Because Partek maintained no contacts with Delaware at the time this suit was initiated, it argues that jurisdiction under § 3104(c)(4) is inappropriate. Instead, Partek suggest the *Merganthaler* rationale is more consistent with a "stream of commerce" theory. According to Partek, jurisdiction based on a stream of commerce is specific rather than general jurisdiction. While § 3104(c)(1) is Delaware's most analogous specific jurisdiction section, Partek argues, it requires that Partek itself have contacts with Delaware. Because Partek's only acts were national in scope, contracting with Huxley to be its sole United States distributor, Partek asserts § 3104(c)(1) is inapplicable.

Plaintiffs, on the other hand, argue that the *Merganthaler* court properly found jurisdiction over Partek under § 3104(c)(4). According to plaintiffs, Partek's jurisdictional activity does not have to occur contemporaneously with the filing of suit. Instead, the fact that Partek derived revenue from

Delaware at the same time plaintiffs were exposed to Partek's product is sufficient to confer jurisdiction under § 3104(c)(4). Additionally, plaintiffs argue that the Court also has jurisdiction over Partek under § 3104(c)(1). Plaintiffs assert that two contracts Partek had with Delaware are sufficient to uphold jurisdiction under this section. First, plaintiffs indicate that two of Partek's employees visited Delaware in 1971 and 1972 to promote Partek's product and visit local plants. Second, plaintiffs suggest that Partek's designation of Huxley as exclusive sales representative, combined with the delivery of their product in the same condition as it was when it left the mines, cause Huxley's contacts to be imputed to Partek.[2] After careful consideration of the matter, this Court concludes that § 3104(c) does confer jurisdiction over Partek in this case.

For jurisdictional purposes, Partek is similar to a manufacturer who places products in the stream of commerce. The stream of commerce theory was designed to confer jurisdiction "in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." *Renner v. Lanard Toys Limited*, 33 F.3d 277, 280 (3rd Cir. 1994) (citations omitted). This theory rests on a specific rather than general jurisdiction rationale. *Id.*

However, the specific jurisdiction provisions of § 3104 do not confer jurisdiction in this case. Section 3140(c)(1), which provides for jurisdiction over one who transacts business or performs work in Delaware, requires that some act on the part of the defendant must have occurred in Delaware and also that plaintiff's claims arise out of that act. *Outokumpu*, 685 A.2d at 729. When a manufacturer passes title to goods to a third party outside of Delaware it is not deemed to have performed an act in this State. *LaNuova D&B, S.p.A. v. Bowe Co., Inc.*,

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[2] Plaintiffs' also argue § 3104(c)(2) and (c)(3) provide jurisdiction in this instance. However, as indicated within this Court need not resort to these sections in order to determine whether § 3104 provides jurisdiction.

Del. Supr., 513 A.2d 764 (1986). Because Partek passed title to Huxley in Helsinki it did not act in this State as required by this section.[3]

An analysis of §§ 3104(c)(2) and (c)(3) leads to a similar conclusions. Section 3104(c)(2) requires the act of contracting to supply services or things in the State. While an act as simple as shipping goods to Delaware is sufficient under § 3104(c)(2), *Moore v. Little Giant Industries, Inc.*, 513 F. Supp. 1043, 1046 (D. Del. 1981), it is clear that this section also requires the defendant perform the act in this State, *Outokumpu*, 685 A.2d at 729. Again, when a manufacturer passes title of goods to a third party outside of this jurisdiction it cannot be said the manufacturer has acted in Delaware. Finally, section 3104(c)(3) requires that a tortious act or omission occur in this State in order to confer jurisdiction. However, in a products liability action, when a foreign manufacturer designs, manufactures, labels and packages a product it does so outside of Delaware. *Moore*, 513 F. Supp. At 1046; *Applied Biosystems*, 772 F. Supp. At 1467. Accordingly, section 3104(c)(3) poses a similar obstacle to jurisdiction in that Partek manufactured, labeled and packaged its product in Finland.

Additionally, this Court agrees that when personal jurisdiction is based on a general jurisdiction theory, the timing of the defendant's contacts with the state are of the utmost importance. This is so because a finding of general jurisdiction requires that a corporation engage in sufficient activities in this State to establish a "general presence." *Chaplake*,

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[3] This is not to say that the defendant must always perform an act in this State. Indeed, it is entirely possible for jurisdictional purposes that a defendant acts in this State *via* its agent. *Outokumpu*, 685 A.2d at 729-30. This can occur in two ways. Plaintiffs can show the defendant had dominion and control of the actor or plaintiffs can provide evidence of the standard principle and agent relationship. *Id.* While plaintiffs argue that Huxley is the agent of Partek for purposes of this motion they have failed to produce any evidence to support this conclusion. Consequently, this Court will not explore whether there were jurisdictional contacts under an agency theory in this matter.

supra, at 5. However, once established, this general presence is not everlasting. To the contrary, when a defendant only has general jurisdictional contacts with a state they may withdraw from that state for jurisdictional purposes. *Gregoire v. Schleicher & Co. International*, C.A. No. 90-4720, Buckwalter, DJ, at 5 (E.D. Pa., Aug. 22, 1991); *Yancey v. National Trust Co., Ltd.*, Del. Ch., C.A. No. 2142, Jacobs, V.C., at 14 (May 7, 1993).

However, this Court cannot conclude that § 3104 fails to confer jurisdiction in this case. Delaware's long arm statute, 10 *Del. C.* § 3104, was created to provide residents a means of redress against those not subject to personal service within the State. *Harmon*, 407 A.2d at 236. In order to effectuate this intent, this section should be construed liberally so as to provide jurisdiction to the maximum extent possible. *Mobil Oil Corp. v. Advanced Envtl. Recycling Technologies, Inc.*, 833 F. Supp. 437, 443 (D. Del. 1993); *Mid-Atlantic Mach. & Fabric, Inc. v. Chesapeake Shipbuilding, Inc.*, Del. Super., 492 A.2d 250, 255 (1985); *Waters v. Deutz Corp.*, Del. Super., 460 A.2d 1332, 1337 (1983). In fact, the only limit placed on § 3104 is that it remain within the constraints of the Due Process Clause. *Transportes Aereos De Angolav. Ronair, Inc.*, 544 F.Supp. 858, 864 (D. Del. 1982); *Jeffreys v. Exten*, 784 F.Supp. 146, 151 (D. Del. 1992); Moore, 513 F.Supp at 1047-48. Partek does not deny that by placing goods in the stream of commerce a manufacturer may be subject to personal jurisdiction in a state where that product causes injury. Indeed, it is clear that the stream of commerce theory is consistent with the due process clause. *World-Wide Volkswagen, Corp. V. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980); *Asahi Metal Industry Co. Ltd. V. Super. Ct. Of Cal., Solano County*, 480 U.S. 286, 100 S.Ct. 1026 (1987); *Renner v. Lanard Toys Limited*, 33 F.3d 277(3rd Cir. 1994). Inasmuch as the stream of commerce theory is consistent with the due process clause it must also provide for jurisdiction under § 3104.

The problem is that the "stream of commerce" theory does not fit neatly into any section of § 3104. On the one hand

jurisdiction under a stream of commerce theory is consistent with general jurisdiction. The theory requires that there be evidence of some intent or purpose on behalf of the manufacturer to serve the Delaware market. *World-Wide Volkswagen*, 444 U.S. at 297. Because this requires the relationship between the forum and the defendant be analyzed, it is general jurisdiction by nature. On the other hand, the stream of commerce theory is consistent with specific jurisdiction. Only when the manufacturer's product enters the forum state and injures a consumer therein is it acceptable to exercise jurisdiction over the manufacturer under this theory. *Id.* As this requires that the relationship between the forum and the controversy be analyzed it is consistent with specific jurisdiction. While this mix of specific and general jurisdiction make it difficult to determine what sub-section of § 3104 applies in this case, the Supreme Court of this State, in *Lanuova D&B, S.p.A. v. Bowe Co., Inc.*, Del. Supr., 513 A.2d 764 (1986), has presented a fitting solution.

In *LaNuova*, the Supreme Court was faced with determining whether an Italian roofing manufacturer, who's product was delivered to a United States distributor in Italy, was subject to jurisdiction under § 3104. *Id.* The Court recognized that specific jurisdiction over the manufacturer was inappropriate because the manufacturer had no direct contacts with Delaware. *Id.* at 768. Because the manufacturer established and implemented a warranty program for its product, and such warranties were distributed in Delaware, the Court concluded that the manufacturer engaged in a persistent course of conduct justifying jurisdiction under § 3104(c)(4). *Id.* However, the import of the *LaNuova* holding is not that a warranty can confer jurisdiction under § 3104(c)(4). Instead, it is the fact that the *LaNuova* Court recognized, absent the warranties, the difficulty one would have in obtaining jurisdiction over a foreign manufacturer under § 3104. In *dicta* the Court stated:

> It is conceivable that a tort claim could enjoy a dual jurisdictional basis under (c)(1) and (c)(4) if the indicia

> of activity set forth under (c)(4) were sufficiently extensive to reach the transactional level of (c)(1) and there was a nexus between the tort claim and transaction of business or performance at work.

LaNuova, 513 A.2d at 768 n.3. Thus, when a manufacturer has sufficient general contacts with Delaware and the plaintiffs' claims arise out of those contacts, jurisdiction is appropriate under § 3104(c)(1) and (c)(4). Additionally, because the stream of commerce theory relies on specific rather than general jurisdiction, the timing of contacts is irrelevant and the manufacturer cannot remove itself from Delaware for jurisdictional purposes.

It is clear that this solution best encompasses all of the intricacies of the stream of commerce theory; taking into account the relationship between manufacturer and the forum and the relationship between the controversy and the forum. However, one must take great care not to overemphasize §§ 3104(c)(1) or (c)(4) under this analysis. It is not important that the indicia of activity under § 3104(c)(4) rise to a level of "general presence" as usually required. Instead, the enumerated activities in this section should be analyzed to determine whether there is an intent or purpose on the part of the manufacturer to serve the Delaware market with its product. Likewise, when analyzing § 3104(c)(1) it is not important that the manufacturer itself act in Delaware. Instead, if the intent or purpose on behalf of the manufacturer to serve the Delaware market results in the interaction of the product to this State and plaintiff's cause of action arises from injuries caused by that product, this section is satisfied. This Court concludes that Delaware's long arm statute, *via* §§ 3104(c)(1) and (c)(4), provides for the exercise of jurisdiction over Partek. Under § 3104(c)(4) Partek exhibited an intent and purpose to serve the Delaware market. Plaintiff has shown that Partek engaged Huxley to be its exclusive distributor of asbestos to the United States. Implicit in this agreement is the fact that Huxley solicit business from the Country as a whole, including Delaware. The result of this solicitation, according to plain-

tiff, is that Partek's earned at least $270,000 from its sales of asbestos and was shipping up to 50 tons per month of asbestos into this State over the course of ten years. Thus, not only did Partek implicitly solicit business from Delaware, it also derived substantial revenue from Delaware and engaged in a persistent course of conduct in this State. Additionally, it is clear that § 3104(c)(1) is satisfied in this instance. Partek's actions resulted in asbestos being shipped into this State at the rate of 50 tons per month over the course of 10 years and plaintiffs' claims arise out their exposure to this asbestos. Consequently this Court concludes that plaintiffs have met their burden of showing 10 Del. C. § 3104 confers jurisdiction over Partek in this case.

IV.

Having concluded that § 3104 confers jurisdiction in this instance this Court must next analyze whether asserting jurisdiction over Partek is consistent with Due Process Clause of the Constitution.

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations. By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Carr v. Pouilloux, S.A., 947 F.Supp 393, 395 (C.D. Ill. 1996) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 42, 105 S.Ct 2174, 2181-82, 85 L.Ed.2d 528 (1985)). Determining whether the exercise of personal jurisdiction is appropriate under the Due Process Clause requires a two part inquiry.

This Court is required to first determine whether the defendant has the requisite minimum contacts with the forum state, and then, whether asserting personal jurisdiction over the defendant is fair and reasonable. *Asahi* at 1030- 1033.

In line with this analysis, Partek argue that asserting jurisdiction over it in this instance would violate its Due Process rights for two reasons. First, Partek argues that it does not have sufficient minimum contacts with this State. Second, Partek asserts that exercising personal jurisdiction over it would violate traditional notions of fair play and substantial justice and would not be fair and reasonable. However, this Court concludes that there are sufficient minimum contacts between Partek and the State of Delaware such that the maintenance of suit in this State would not violate Partek's Due Process rights. In addition, this Court concludes that requiring Partek to defend an action in Delaware would not violate traditional notions of fair play and substantial justice.

A. *Minimum Contacts*

Partek argues that in the case *sub judice* its contacts with Delaware are simply not sufficient to satisfy Due Process. According to Partek, the appropriate test for minimum contacts is found in *Asahi Metal Ind. Co. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 103, 107 S.Ct. 1026 (1987). Partek asserts that, in a plurality decision, the Court set out specific standards for measuring purposeful availment, that is, there must be evidence that supports an intent or purpose to serve the Delaware market. Partek indicates that examples of such evidence include: (1) designing the product for the market in the State; (2) establishing channels for giving regular advice to customers in the State; (3) advertising in the forum state; and (4) marketing the product through a distributor who has agreed to serve as the sales agent in the State. Because there is no evidence that indicates Partek engaged in any of the enumerated activities, Partek contends that exercising jurisdiction in this case would violate its Due Process rights.

Partek adds that its engagement with Huxley as its national distributor is inconsequential. According to Partek, contacts with the United States as a whole simply cannot confer upon an individual state the power to exercise jurisdiction.

The "constitutional touchstone" in a personal jurisdiction inquiry "remains whether the defendant purposefully established 'minimum contacts' in a forum state." *Asahi* at 1030 (citing *Burger King Corp.*, 471 U.S. 462). While the defendant need not be physically present in this state, *Burger King Corp.*, 471 U.S. at 476, there must be some indication that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denkla*, 357 U.S. 235, 78 S.Ct. 1228, 1240 (1958) (citations omitted).

The relevant framework for determining whether a manufacturer has established minimum contacts under a stream of commerce analysis was last addressed by the Supreme Court in *Asahi Metal Ind. Co. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 115, 107 S.Ct. 1026 (1987). In *Asahi* the Court was faced with determining whether the exercise of jurisdiction over a Japanese manufacturer of valve assemblies by a California court was consistent with the Due Process Clause. The Court indicated that under a stream of commerce analysis, it is not sufficient that a defendant manufacturer place a product in the stream of commerce knowing it will enter the forum state. *Asahi* at 1032. Instead, there must be some act on the part of the defendant "purposefully directed to the forum State" which indicates an "intent or purpose to serve the market in the forum State"; some evidence of "additional conduct" on the part of the defendant is required.[4] *Asahi* at 1032. The

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[4] It is important to note that an intent or purpose to serve the forum market or "additional conduct" requirement represents a more restrictive view of minimum contacts in a stream of commerce analysis. This view was offered by Justice O'Connor joined by the Chief Justice, Justices Powell and Scalia in a plurality opinion and had been adopted in this State in *Mayhall v. Nempco, Inc.*, Del. Super., C.A. No. 91C-10-018, Steele, V.C., at 5 (July 29, 1994). Justice Brennan, joined by Justices Blackmun, Marshall and White, offer a less restrictive view. According

Asahi Court stated that examples of such conduct include "designing the product for the market of the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

In the instant case it is clear Partek placed asbestos in the stream of commerce and that asbestos made its way to Delaware. Accordingly, the inquiry turns on whether there is evidence that shows Partek "purposefully directed" this asbestos to Delaware exhibiting an "intent or purpose" to serve the Delaware market.

In fact, Partek exhibited an intent or purpose to serve the Delaware market. The record reveals that Partek engaged Huxley to be its exclusive distributor of asbestos in the United States. Implicit in this agreement is the fact that Huxley solicit business from the Country as a whole, including Delaware. Thus, not only did Partek anticipate that its product would be distributed to all states including Delaware, it took affirmative steps to direct its product here through this agreement.[5] Partek's intent or purpose to serve the Delaware market is manifest in the fact that its employees made two visits to Delaware in 1971 and 1972. While the purpose of

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to Justice Brennan, the stream of commerce theory does not require a showing of "additional conduct." *Asahi* at 1034. To the contrary, "as long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Asahi* at 1034.

[5] The United States Supreme Court has consistently held that the existence of a distributorship agreement between the defendant and the forum is sufficient to show the defendant had minimum contacts with the forum State. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 566 (1980)(evidence that a manufacturer serves or seeks to serve the forum market through others is sufficient evidence of minimum contacts.); *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 1032 (1987)(evidence that a manufacturer is "marketing a product through a distributor who has agreed to serve as the sales agent in the forum State" is the "additional conduct" necessary for a showing of minimum contacts.).

these visits is disputed, it is clear that Partek's employees knew that its asbestos was being shipped into Delaware. Had Partek not intended its product to enter Delaware it certainly would have directed Huxley to stop shipments to this forum after these visits.

However, Partek argues that the contract with Huxley was an exclusive distribution agreement to serve the United States and not Delaware. According to Partek, contacts with the country as a whole are not sufficient to confer jurisdiction in this case. As such, this agreement does not exhibit and intent or purpose to serve the Delaware market.

In *A. Uberti and C. v. Leonardo*, Ariz. Supr., 892 P.2d 1354 (1995), *cert. denied*, 166 S.Ct. 273 (1995), the Supreme Court of Arizona addressed this very argument. In an *en banc* decision the Arizona court found that an Italian Manufacturer's intent to distribute its goods throughout the American market was sufficient to satisfy the minimum contacts test under the *Asahi's* analysis. *Id.* at 1362. The court came to this conclusion for several reasons. First, the Court recognized that such an argument defies common sense. By targeting the United States as a whole and not any one particular market no State would have jurisdiction over the manufacturer. *Id.* This would allow a foreign company to sell faulty products to United States citizens and never be accountable in any forum where the product caused injury. *Id.* According to the *Uberti* court, to allow one to knowingly and intentionally distribute products in America through an American company and avoid jurisdiction of the American courts by simply ignoring the activities of its distributors is not logical. *Uberti*, 892 P.2d at 1362-63.

The Arizona noted that such a practice would put American companies at an economic disadvantage. *Id.* at 1363. According to the court, this rule would allow foreign manufacturers to take advantage of the American market while remaining immunized from the liability inherent in defective products. *Id.* The Arizona court opined that such an economic inequity would drive American manufacturers out of business. *Id.*

Based on the foregoing the Arizona court concluded that "allowing a defendant that has purposefully exploited the United States market to 'insulate itself from the reach of the forum State's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of the products' would undermine principles of fundamental fairness and due process." *Uberti*, 892 P.2d at 1363 (citations omitted).

In fact, numerous courts have concluded that a manufacturer who distributes their product through a national or regional distributor have established minimum contacts with the forum state. *See, Tobin v. Astra Pharmaceutical Prod., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993), cert. denied sub nom. *Duphar v. Tobin*, 510 U.S. 914, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993); *Warren v. Honda Motor Co.*, 669 F.Supp. 365, 370 (D. Utah 1987); *Wessinger v. Vetter Corp.*, 685 F.Supp. 769, 777 (D.Kan. 1987); *Hall v. Zambelli*, 669 F.Supp. 753, 757 (S.D.W.Va. 1987); *Burton v. Subaru of America*, 646 F.Supp. 78 (N.D.Ga. 1986); *Waters v. Deutz Corp.*, Del. Super., 460 A.2d 1332, 1337-38 (1983). Consequently, Partek's argument that the distribution agreement was national in scope and cannot confer personal jurisdiction in Delaware must fail. As a result, this Court concludes that Partek, through its distribution agreement with Huxley, has engaged in the additional conduct necessary under the stream of commerce theory so as to establish minimum contacts with Delaware.

A. *Fairness and Reasonableness*

Finally, this Court must determine whether exercising personal jurisdiction over Partek is fair and reasonable. Partek argues that even if this Court found that there was sufficient contacts in this case, asserting personal jurisdiction over them would violate traditional notions of fair play and substantial justice. Partek recognizes that in assessing the fairness and reasonableness of exercising jurisdiction the Court is required

to weigh the burden placed on the defendant, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in efficient resolution of controversies and furthering fundamental social policies. However, Partek indicates that the Supreme Court in *Asahi* made clear that great emphasis should be placed on the burdens that arise from having to defend an action in a foreign legal system. According to Partek the facts of this case weight heavily against the exercise of jurisdiction under the fairness and reasonable prong of the Due Process analysis.

Under the Due Process Clause, in order to properly exercise jurisdiction over a foreign defendant, that defendant's contacts with the forum state "must be such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *World-Wide Volkswagen*, 444 U.S. at 292. In evaluating the fairness and reasonableness of jurisdiction the court must consider several factors. These include; the burden on the defendant, the interest of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining relief, the interest of the interstate judicial system in efficiently resolving disputes, and the combined interest of the sovereigns in advancing "substantial social policies." *Id.* (citations Omitted). In this analysis the burden on the defendant is the primary concern. *Id.* This is especially true when the defendant finds itself faced with defending a law suit in a foreign legal system. *Asahi*, 480 U.S. at 1033. However, once minimum contacts have been established, the interests of the plaintiff and the forum will usually favor the exercise of jurisdiction. *Id.* at 114.

In this case reasonableness and fairness do favor the exercise of jurisdiction over Partek. The plaintiffs here, exposed to dangerous levels of asbestos, clearly have a significant interest in obtaining relief. Moreover, it can hardly be said that requiring a plaintiff, injured in Delaware, to seek relief in a foreign country is consistent with the plaintiff's due process rights. Additionally, Delaware has a strong interest in protecting the health and welfare of its citizens. Exercising

jurisdiction over the manufacturer of dangerous products will provide an effective and efficient forum for its citizens while deterring the introduction of other dangerous products to this State. Accordingly, weighing the combined interest of the plaintiffs and Delaware against the burden on Partek leads this Court to conclude that jurisdiction over Partek is reasonable and fair such that it does not violate "traditional notions of fair play and substantial justice."

In a motion to dismiss for lack of personal jurisdiction the duty is on the plaintiff to show Delaware's long arm statute, 10 *Del. C.* § 3104, confers jurisdiction. After concluding that § 3104 confers jurisdiction, the Court is required to determine whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Constitution. Here, plaintiffs have shown that 10 *Del. C.* § 3104(c)(1) and (c)(4) in fact confer jurisdiction over Partek in this case. Additionally, as indicated within, this Court concludes that exercising jurisdiction over Partek does not violate Partek's Due Process rights. Accordingly, Oy Partek Ab's motion is DENIED.

IT IS SO ORDERED.

/s/ JOHN E. BABIARZ, JR.
John E. Babiarz, Jr., Judge